

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TODD BRINKMEYER,

Petitioner,

v.

WASHINGTON STATE LIQUOR AND  
CANNABIS BOARD,

Respondent.

CASE NO. C20-5661 BHS

ORDER INVOKING *PULLMAN*  
ABSTENTION, REMANDING  
STATE LAW CLAIMS, AND  
STAYING FEDERAL CLAIMS

This matter comes before the Court on Petitioner Todd Brinkmeyer's ("Brinkmeyer") petition for declaratory relief, Dkt. 1-2, the Court's order to show cause, Dkt. 17, and the parties' responses, Dkts. 18, 19.

**I. PROCEDURAL AND FACTUAL BACKGROUND**

On June 8, 2020, Brinkmeyer filed a petition for declaratory relief against Defendant Washington State Liquor and Cannabis Board ("Board") in Thurston County Superior Court for the State of Washington. Dkt. 1-2. Brinkmeyer asserts numerous claims based on the theory that the Board's residency requirements are unlawful. *Id.*

1 In 2012, Washington voters approved the legalization and sale of marijuana. The  
2 relevant statutes set forth certain requirements and delegates additional rule making  
3 authority to the Board. The statutory residency requirement provides in part as follows:  
4 “No license of any kind may be issued to: . . . (ii) A person doing business as a sole  
5 proprietor who has not lawfully resided in the state for at least six months prior to  
6 applying to receive a license.” RCW 69.50.331(1)(b)(ii). The Board expanded the  
7 residency requirement as follows:

8 Under RCW 69.50.331 (1)(c), all applicants applying for a  
9 marijuana license must have resided in the state of Washington for at least  
10 six months prior to application for a marijuana license. All business entities  
11 including, but not limited to, partnerships, employee cooperatives,  
12 associations, nonprofit corporations, corporations and limited liability  
13 companies, applying for a marijuana license must be formed in  
14 Washington. All members, governors, or agents of business entities must  
15 also meet the six month residency requirement. Managers or agents who  
16 manage a licensee’s place of business must also meet the six month  
17 residency requirement.

18 WAC 314-55-020(10).

19 Brinkmeyer alleges that the Board developed the residency requirements because  
20 the federal government initially refused to cooperate in the State’s legalization of  
21 marijuana. Specifically, he alleges:

22 The [Board] initially included the Residency Requirements because  
of concerns regarding criminal background investigations. After the people  
of Washington approved I-502, the FBI indicated it would not provide  
Washington with access to its national criminal database, and the State was  
concerned it could verify applicants’ criminal histories only through the  
Washington State Patrol database. But the FBI relented—before the very  
first license was issued under I-502—and agreed to give the [Board] access  
to the federal database.

The [Board] has since justified the Residency Requirements by  
asserting it is beneficial to exclude nonresidents from participating in the

1 state's marijuana industry to the same degree as residents. [Board]  
2 members have justified the Residency Requirements as necessary to protect  
"mom and pop" marijuana businesses in Washington.

3 Dkt. 1-2, ¶¶ 17–18.

4 Regarding Brinkmeyer, he alleges that the Board has twice vetted and approved  
5 him as a debt financier for marijuana businesses. *Id.* ¶ 20. The Board's residency  
6 requirements, however, prevent Brinkmeyer "from sharing in the profit of those  
7 businesses by providing equity financing because he is not a Washington resident." *Id.*  
8 ¶ 22. Brinkmeyer alleges that an owner of a marijuana retailer "would like to bequeath in  
9 part and sell in part his ownership interest in the" business to Brinkmeyer. *Id.* ¶ 24. "On  
10 May 20, 2020, the [Board] confirmed it would deny [Brinkmeyer's] application to be put  
11 on the Retailer's license because [Brinkmeyer's] does not comply with the Residency  
12 Requirements." *Id.* ¶ 25. Brinkmeyer asserts that the residency requirements are  
13 unlawful because they violate numerous provisions of the United States constitution,  
14 violate the privileges and immunities clause of the Washington constitution, and the  
15 Board has exceeded its rulemaking authority under the relevant Washington statute. *Id.*  
16 ¶¶ 30–65.

17 On July 7, 2020, the Board removed the matter to this Court asserting federal  
18 question jurisdiction under 28 U.S.C. § 1331. Dkt. 1.

19 On August 6, 2020, Brinkmeyer filed a motion for preliminary injunction. Dkt. 6.  
20 On August 24, 2020, the Board responded. Dkt. 11. On August 28, 2020, Brinkmeyer  
21 replied. Dkt. 14. On September 8, 2020, the Court ordered the parties to show cause  
22 why the Court has jurisdiction over a state licensing issue for a controlled substance

1 under the Controlled Substances Act (“CSA”). Dkt. 17. On September 14, 2020, both  
 2 parties responded. Dkts. 18, 19. Brinkmeyer argues that the Court has jurisdiction but  
 3 that some type of abstention may be appropriate. Dkt. 19. The Board contends that  
 4 jurisdiction is appropriate and that the Court should dismiss all of Brinkmeyer’s claims  
 5 with prejudice. Dkt. 18 at 8 & n.2.

## 6 II. DISCUSSION

7 Upon review of the parties’ responses, the Court concludes that it has jurisdiction  
 8 to hear Brinkmeyer’s claims despite the illegality of marijuana under the CAS. The  
 9 Court, however, “may *sua sponte* consider *Pullman* abstention at any time.” *Columbia*  
 10 *Basin Apartment Ass’n v. City of Pasco*, 268 F.3d 791, 802 (9th Cir. 2001). Abstention  
 11 under *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), “is a narrow exception  
 12 to the district court’s duty to decide cases properly before it. *Pullman* allows  
 13 postponement of the exercise of federal jurisdiction when ‘a federal constitutional issue .  
 14 . . might be mooted or presented in a different posture by a state court determination of  
 15 pertinent state law.’” *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984)  
 16 (quoting *Cty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959)).  
 17 Specifically, *Pullman* holds that “federal courts should abstain from decisions when  
 18 difficult and unsettled questions of state law must be resolved before a substantial federal  
 19 constitutional question can be decided. By abstaining in such cases, federal courts . . .  
 20 avoid both unnecessary adjudication of federal questions and ‘needless friction with state  
 21 policies . . . .’” *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (citation  
 22 omitted); *see also Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983) (“When a

1 court abstains in order to avoid unnecessary constitutional adjudication . . . it is not  
2 seeking to protect the rights of one of the parties; it is seeking to promote a harmonious  
3 federal system by avoiding a collision between the federal courts and state (including  
4 local) legislatures.”).

5 The Ninth Circuit has set forth three criteria to determine whether *Pullman*  
6 abstention is appropriate. First, the case must touch on a sensitive area of social policy  
7 upon which federal courts ought not to enter unless no alternative to its adjudication is  
8 open. Second, it must be plain that the constitutional adjudication can be avoided if a  
9 definite ruling on the state issue would terminate the controversy. Finally, the possible  
10 determinative issue of state law must be uncertain. *Columbia Basin*, 268 F.3d at 802  
11 (citing *Confederated Salish v. Simonich*, 29 F.3d 1398, 1407 (9th Cir. 1994)).

12 In this case, the Court concludes *sua sponte* that *Pullman* abstention is warranted  
13 because all three criteria are met. First, the Court concludes that the case touches on the  
14 issue of licenses for marijuana, which is prohibited under the CSA. This is a sensitive  
15 area of social policy that federal courts should not enter unless no other alternative exists.  
16 Such restraint allows the States to experiment so long as they do not infringe on  
17 fundamental constitutional rights.

18 Second, it is clear that the federal constitutional questions may be avoided if  
19 Brinkmeyer obtains a definitive ruling on the state issues. If the Board exceeded its  
20 rulemaking authority by extending the residency requirements, then there is no need to  
21 pass upon the federal questions. Similarly, a definitive ruling on whether the  
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1 requirements violate the privileges and immunities clause of the Washington constitution  
2 would clarify the Board's position and could terminate the controversy.

3 Third, the state laws on this evolving experiment are unclear. Thus, the Court  
4 need not pass upon the federal questions when such constitutional determinations could  
5 ultimately be advisory opinions. *See, e.g., PDK Labs., Inc. v. United States Drug Enf't*  
6 *Admin.*, 362 F. 3d 786, 799 (D.C. Cir. 2004) (The "cardinal principle of judicial restraint"  
7 is that "if it is not necessary to decide more, it is necessary not to decide more.")  
8 (Roberts, J., concurring in part and concurring in judgment).

9 Finally, the proper procedure for *Pullman* abstention is to stay determination of  
10 the federal claims and remand the state law claims for further proceedings in state court.  
11 *San Remo Hotel v. City & Cty. of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998)  
12 ("Once *Pullman* abstention is invoked by the federal court, the federal plaintiff must then  
13 seek a definitive ruling in the state courts on the state law questions before returning to  
14 the federal forum."). Therefore, the Court will sever and remand Brinkmeyer's state law  
15 claims and then stay and administratively close the federal claims.

### 16 III. ORDER

17 Therefore, it is hereby **ORDERED** that the Court *sua sponte* invokes *Pullman*  
18 abstention on Brinkmeyer's federal claims and severs Brinkmeyer's state law claims.  
19 The Clerk shall remand the matter to Thurston County Superior Court for resolution of  
20 Brinkmeyer's state law claims, terminate the pending motion, and administratively close  
21 this matter pending final resolution of the state law claims. The parties shall file a motion  
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1 to lift the stay once state court matter is resolved or move to dismiss this case if the  
2 dispute is otherwise resolved.

3 Dated this 5th day of October, 2020.

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6 BENJAMIN H. SETTLE  
7 United States District Judge  
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